85-740

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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STATE SAVINGS AND LOAN ASSOCIATION
*Petitioner,*

vs.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
and SNIDER CAMPBELL,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the New Mexico State Supervisor of Savings and Loan Associations had the authority to consent to the Federal Savings and Loan Insurance Corporation as receiver for State Savings and Loan Association of Clovis, New Mexico.

2. Whether the Federal Home Loan Bank Board complied with the requirements of 12 U.S.C. § 1729(1)(B) in appointing the Federal Savings and Loan Insurance Corporation as receiver for State Savings and Loan Association of Clovis, New Mexico.

3. Whether the lower courts correctly applied the law of summary judgment in depriving Petitioner of the right to an evidentiary hearing as requested.

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1. As a matter of law, the Supervisor of savings and loans for the State of New Mexico was wholly without authority to give the necessary approval for the Federal Home Loan Bank Board to proceed to appoint FSLIC as Receiver for Petitioner under 12 U.S.C., § 1729(c)(1)(B) for the reason that the Supervisor was not granted statutory jurisdiction over New Mexico chartered savings and loan institutions and, even if the general grant of supervisory authority over Petitioner is deemed sufficient to authorize his approval, the Supervisor had subjected and surrendered his authority to grant or withhold approval, to the jurisdiction of the Ninth Judicial District Court for Curry County, New Mexico, when he filed cause no. 83-CV28979 as established by Appendix IV (duly authenticated copy of the Petition, Motion for Temporary Receiver and Order appointing same) which Honorable Court declined to delegate said authority, notwithstanding the Supervisor's specific request therefore in his Petition and Motion. ..... 11
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## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinions of the District Court for the U.S. District Court District of Columbia is not reported and is attached as Appendix I. The opinion of the Court of Appeals for the District of Columbia is not reported and is attached as Appendix II. The Motion for Rehearing was denied and is attached as Appendix III.

## JURISDICTION

The judgments of the Court of Appeals for the District of Columbia Circuit were made and entered on May 17, 1985 and June 21, 1985, respectively and copies thereof are appended to this petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of 12 U.S.C. 1729(1)(B), (1982) and New Mexico State Statutes 58-10-1 et seq. (1978) and Rule 56, Fed. R.Civ.P are quoted, infra.

## STATEMENT CONCERNING CORPORATE AFFILIATIONS OF STATE SAVINGS AND LOAN ASSOCIATION

State Savings and Loan Association, Clovis, New Mexico is now and was at all times pertinent hereto a corporation organized and existing under the laws of the state of New Mexico. It was, prior to the appointment of its Receiver, a member of the Home Loan Bank of Dallas and was insured by the Federal Savings and Loan Insurance Corporation. Said corporation is not a parent company and has no subsidiaries or affiliates other than those named above.

## STATEMENTS

State Savings and Loan Association of Clovis, New Mexico, ("Petitioner") was a small savings and loan association organized and chartered under the laws of the State of New Mexico. As of September 30, 1983, Petitioner reported assets in excess of 41 Million Dollars and a positive net worth.

On November 1, 1983, Snider Campbell, (Defendant-Respondent, hereinafter "Supervisor") the duly qualified, appointed and acting supervisor of the Savings and Loan Bureau, Financial Institutions Division, Regulation and Licensing Department of the State of New Mexico, filed in the Ninth Judicial District Court of Curry County, New Mexico, a "Complaint for Appointment of a Receiver" and a "Motion for Temporary Restraining Order and Immediate Appointment of Temporary

Receiver." Attached for the Court's convenience as Appendix IV.

In the first paragraph of the Complaint, the supervisor identifies himself as "the duly qualified, appointed and acting supervisor of the Savings and Loan Bureau, Financial Institutions Division, Regulation and Licensing Department of the State of New Mexico (Supervisor) and pursuant to the New Mexico Savings and Loan Act, Section 58-10-1 *et seq.* NMSA 1978 (Savings and Loan Act) exercises general regulatory and supervisory authority over all state chartered savings and loan associations in New Mexico."

In paragraph 14 of his Complaint, the Supervisor states: "The Supervisor proposes that the Court appoint him as receiver since he is not disqualified from acting in that capacity by Section 58-10-85 of the Savings and Loan Act. The Supervisor has supervised examinations of State and is therefore familiar with its circumstances. He is also already bonded in his capacity as a state employee. Finally, the Supervisor has served as the receiver for three other New Mexico chartered savings and loan associations."

In his prayer, the Supervisor requests:

"A. to appoint the Supervisor as receiver for State;"

and

"F. to order him in that capacity to tender the receivership to the FSLIC in the event he determines it is necessary to liquidate and close State;"

The Complaint is verified by the Supervisor.

The Supervisor's Motion commences:

"COMES NOW the Plaintiff, SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institutions Divi-

> sion, Regulation and Licensing Department, State of New Mexico . . ."

and concludes his Motion in part as follows:

> "B. to appoint the Supervisor temporary receiver for State;"

and

> "G. to order him in that capacity to tender the receivership to the FSLIC in the event he determines it is necessary to liquidate and close State;"
>
> The motion is likewise verified by the Supervisor.

On November 2, 1983, after an evidentiary hearing on the Supervisor's Motion, the Court found that the plaintiff was Supervisor of the Savings and Loan Bureau, Financial Institutions Division, etc. and that as such he exercises general regulatory and supervisory authority over all state chartered savings and loan associations in New Mexico and in paragraph 9. "The Supervisor is qualified to be appointed receiver of State and is bonded in his capacity as a state employee" and ordered that "the Supervisor be, and hereby is appointed temporary receiver for State;" and that "the Supervisor in that capacity" shall do certain things, among which was to petition the court for further instructions and other relief. Language in the Order that would have authorized liquidation or given the receiver authority to consent to the appointment of FSLIC as receiver was stricken and initialed by the New Mexico District Judge. The Order entered by the Court did not state that Petitioner was "insolvent", but did state in its preamble that it "appeared" that Petitioner's aggregate assets did not have a fair market value equal to that of its liabilities.

On November 3, 1983, the Supervisor signed the approval form prepared by the Federal Home Loan Bank Board to

permit it to appoint FSLIC as receiver for petitioner. On the same date the FHLBB issued its Appointment of Receiver for State Savings and Loan Association Under § 406(c)(1)(B), No. 83-609 wherein it stated "WHEREAS, Pursuant to Section 406(c)(1)(B) of the National Housing Act, as amended ("NHA") (12 U.S.C. § 1729(c)(1)(B) (1982)) . . ."

Petitioner challenged the appointment of a receiver by its Complaint to Require Removal of the Receiver filed in the United States District Court for the District of Columbia against Snider Campbell, the Supervisor and the Temporary State Receiver for the State of New Mexico, and against the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC") on December 2, 1983. The Complaint was filed with supporting documentation and alleged that the grounds required by 12 U.S.C. § 1464(d)(6)(A) for the appointment of a receiver were not met in this case that the Board exceeded its authority under 12 U.S.C. § 1729(c)(1)(B)(ii)(I), and that the Supervisor in its capacity as Temporary Receiver had no authority to authorize a federal receivership. The Complaint prayed for the removal of the FSLIC as the receiver with a concurrent return of Petitioner to its shareholders with other further relevant relief. On December 23, 1983, the FHLBB and the FSLIC filed an answer admitting and denying various allegations and raising affirmative defenses.

The Supervisor filed an answer on January 12, 1984 which was amended on June 25, 1984. On March 13, 1984 the Supervisor filed a Motion to Dismiss the Complaint on the basis of lack of subject matter jurisdiction and lack of personal jurisdiction. Petitioner filed its Opposition.

The FHLBB and the FSLIC filed a Motion for Summary Judgment on January 20, 1984 with numerous exhibits. Petitioner filed its Opposition.

On June 26, 1984, FSLIC & FHLBB filed their Supplemental Motion for Summary Judgment, with Points and Authorities and several exhibits elaborating on and reiterating their prior arguments. On July 6, 1984, Petitioner filed its Response in Opposition to their Supplemental Motion for Summary Judgment, arguing that there were material facts as to which there existed a genuine issue, and that Petitioner's prior filings were sufficient to defeat the Motion for Summary Judgment. Despite the Court's June 7, 1984 Order to the contrary, on July 13, 1984, the FSLIC & FHLBB filed a reply to this Memorandum in Response to Federal Defendants' Supplemental Motion for Summary Judgment.

In parallel proceedings in this same case, on January 26, 1984, Petitioner filed a Motion for Preliminary Injunction to bar the disposing of or dissipating of the assets of State or for the posting of a bond for the value of such assets pending the resolution of the suit below. The FSLIC & FHLBB filed their Opposition to the Application for Injunctive Relief on February 8, 1984, to which Petitioner filed its Reply on February 21, 1984. The FSLIC & FHLBB filed their Surreply in Opposition to the application for preliminary injunctive relief on February 23, 1984.

In the midst of these extensive substantive motions, Petitioner was attempting to obtain sufficient factual information from Respondents, who were in possession of all of the relevant documents of State, to proceed with their case. On January 26, 1984, Petitioner filed a Motion for Expedited Discovery requesting expedited discovery and a discovery conference on the grounds that Petitioner had attempted to discover relevant documents but was refused by Respondents and that Petitioner was unable to go forward with its case in the face of this refusal. On the same day, Petitioner filed its First Request for Production of Documents. The FSLIC & FHLBB filed their Reply to the Motion for Expedited Discovery on February 8,

1984, objecting to the expedition of discovery and Petitioner filed a Response to federal government defendants' Reply on February 21, 1984. On February 28, 1984, the FHLBB filed its Response to the Request for Documents objecting to producing documents from the period September 1982 to the date of the trial, and also stating, in the event of trial, their objection to all documents for the period after November 3, 1983. Many documents were produced, but not by any means all of the relevant non-privileged documents requested. On February 28, 1984, the Trial Court filed an Order denying plaintiff's Motion for Expedited Discovery and Petitioner's request to convene a discovery conference.

On June 13, 1984, the Supervisor responded to Petitioner's Second Document request, objecting to almost all of document requests, filing an affidavit of Supervisor Campbell and four one-page documents in response.

On July 18, 1984, Petitioner filed its Motion for and Order for the Production of Documents, to permit the production and inspection of copies of certain enumerated, relevant, documents which had been previously requested by Petitioner in its prior document requests. The motion was not ruled on by the Trial Court.

Petitioner filed Motions for Leave to File and Amended Complaint on February 27, 1984 and on March 13, 1984, requesting permission to amend its Complaint based on additional facts learned by Petitioner and on the requirements of justice that all issues between the parties be fully litigated in this single action.

This motion was opposed after an extension of time was obtained, by FHLBB & FSLIC's Points and Authorities in Opposition filed March 12, 1984. On April 12, 1984, the Supervisor filed his opposition to the Motion for Leave to Amend the Complaint, with Memorandum of Points and Authorities in

Support. And, on April 16, 1984, Petitioner filed its Response to the Opposition to the Motion for Leave to File Amended Complaint on the grounds that Petitioner had met the test for a grant of leave to amend a complaint provided under Fed.R.Civ.P., Rule 15 (a). On April 20, 1984, Petitioner filed its Response to the Supervisor's Opposition to the Motion for Leave to Amend the Complaint.

On June 7, 1984, the Trial Court filed a Memorandum Order granting the Motion for Leave to File Amended Complaint; accepting the attached Amended Complaint for filing; ordering that Respondents supplement their pending motions on or before June 26, 1984; and that any response by Petitioner be filed on or before July 6, 1984.

Intervenors, W. W. Taylor and Southwest Mortgage Service Corp., moved for leave to intervene as plaintiffs to assert their financial interest in the property (State) taken by Respondents as alleged in the Complaint, on March 1, 1984. After obtaining extensions of time, the FHLBB & FSLIC opposed intervenors' Motion for Leave to Intervene on March 15, 1984, and the Supervisor filed his opposition with Memorandum of Points and Authorities on April 12, 1984. Intervenors filed responses to the various defendants' oppositions to their Motion for Leave to Intervene on April 16, 1984, and on April 20, 1984. On June 7, 1984, the Trial Court filed a Memorandum Order denying intervenors' Motion for Leave to Intervene in this action.

On July 31, 1984, the Trial Court decided the pending motions for summary judgment and dismissal and entered a Memorandum Opinion and Order. After discussing the facts of the case, the Court dismissed the Complaint against the Supervisor on the basis that 12 U.S.C. § 1464(d)(6)(A) did not authorize an action against a New Mexico official. The Trial Court granted summary judgment in favor of the FHLBB and

the FSLIC and stated there were no disputed material facts and that judgment as a matter of law was appropriate as the proper procedures were followed by the FHLBB in appointing FSLIC as receiver under 12 U.S.C. 1464(d)(6)(A). The Order filed by the Court the same day dismissed the case with prejudice.

On August 10, 1984, Petitioner filed its Motion to Vacate and/or to Reconsider Order and for a Rehearing, arguing the FHLBB & FSLIC repeatedly refused Petitioner's requests for documents that would prove State's solvency, that would refute the alleged grounds upon which a receiver was appointed for Petitioner, that a hearing should have taken place on the summary judgment issue and that summary judgment should not have been granted as there were material facts in dispute and Respondents were not entitled to judgment as a matter of law. On August 24, 1984, FHLBB & FSLIC opposed Petitioner's Motion to Vacate, etc., stating the Trial Court had not abused its discretion in failing to grant a hearing on the summary judgment issue and that plaintiff's request for additional discovery had to be denied. The Trial Court filed its Memorandum Order on September 17, 1984, denying Petitioner's motion and stating as grounds that the pleadings "never indicated that further discovery was required to provide a fuller opposition", and that Petitioner had not properly requested a continuance for purposes of further discovery. The Trial Court also stated that Petitioner's "lack of diligence" could not provide the basis for the Court to vacate or reconsider its prior decision. The Trial Court also stated there was no basis for the Court to conduct a hearing on the motion. It was this Order and its underlying Order of July 31, 1984, from which the appeal was taken.

The Court of Appeals for the District of Columbia Circuit issued its judgment on May 17, 1985 without opinion. On Petitioner's application of rehearing, the Court of Appeals

denied said application without comment on June 21, 1985. Petitioner moved for extension of time to file based on the foregoing: (1) withdrawal of counsel during pendancy of appeal; (2) extensive obligations of new counsel; and (3) complexity of the question concerning validity of such action by FHLBB, which was granted by this court. From these decisions Petitioner files this Writ of Certiorari on October 18, 1985.

## EXISTENCE OF JURISDICTION BELOW

The District Court for the District of Columbia had jurisdiction pursuant to 12 U.S.C. § 1464(d)(6)(A), which provides for challenge of the appointment of a receiver in the United States District Court of the district in which the association is located or in the District of Columbia. Jurisdiction over the Supervisor was obtained pursuant to this same statute as Petitioner challenged the Supervisor's authority to tender the receivership to the FSLIC.

## NECESSITY FOR CERTIORARI

Certiorari should be granted in matters involving substantial issues of Constitutional dimension which are of nationwide portent as in the instant matter. This Court may take judicial notice of the inordinate numbers of savings and loan institutions which have been, are, and will be failing or approaching insolvency and of the readily apparent trend to nationalize the savings and loan industry.

Since this case involves the taking of a savings and loan chartered under the laws of the State of New Mexico and insured by the FSLIC, which had previously been placed in temporary receivership by the Ninth Judicial District Court of Curry County, New Mexico, and placing it in a federal receivership of the FSLIC by the FHLBB, issues of *Due Process, Federal Supremacy, Comity, Conflict of Laws, and Judicial Interpretation of Federal Legislation* are involved and deserve the full attention of this Honorable Court of last resort.

The decision below must be reviewed because it erroneously interprets the plain meaning of the statutes in the appointment of a federal receiver over state-chartered savings and loans so as to disrupt the orderly administration of state receivership authority and to permit encroachment by federal authorities in an area commited by statute to state-regulatory authority.

The Court of Appeals decision incorrectly interprets the holding and is in conflict with *Fidelity Savings & Loan Ass'n v. FHLBB,* 689 F. 2d 803 (9th Cir. 1982) cert. den. ____ US ____, 103 S. Ct. 1893 (1983), or if it is not so in conflict, the "issues of far reaching importance" left undecided in this case must be addressed. In any event this Court should grant this Petition For A Writ Of Certiorari.

## ARGUMENT AND AUTHORITIES

Petitioner's first two issues for consideration are inextricably interlinked and will, therefore, be argued together.

**1. As a matter of law, the supervisor of savings and loans for the State of New Mexico was wholly without authority to give the necessary approval for the Federal Home Loan Bank Board to proceed to appoint FSLIC as Receiver for Petitioner under 12 U.S.C., § 1729(c)(1)(B) for the reason that the Supervisor was not granted statutory jurisdiction over New Mexico**

**chartered savings and loan institutions and, even if the general grant of supervisory authority over Petitioner is deemed sufficient to authorize his approval, the Supervisor had subjected and surrendered his authority to grant or withhold approval, to the jurisdiction of the Ninth Judicial District Court for Curry County, New Mexico when he filed Cause No. 83-CV-28979 as established by Appendix IV (duly authenticated copy of the Petition, Motion for Temporary Receiver and Order appointing same) which Honorable Court declined to delegate said authority, notwithstanding the Supervisor's specific request in his Petition and Motion.**

**2. As a matter of law the Federal Home Loan Bank Board's appointment of the Federal Savings and Loan Insurance Corporation as receiver for Petitioner is a nullity without a valid approval from the state official having jurisdiction over the State chartered insured institution, preceeding as it did under 12 U.S.C., § 1729(c)(1)(B).**

12 U.S.C., § 1729(c)(1)(B), under which the FHLBB acted, provides as follows:

"(B)(i) (I) Notwithstanding any provision of the constitution or laws of any State, or of this section, in the event the Federal Home Loan Bank Board determines that any of the grounds specified in section 5(d)(6)(A)(i), (ii), or (iii) of the Home Owners' Loan Act of 1933 [12 USC 1464(d)(6)(A)(i), (ii), or (iii)] exist with respect to an insured institution, other than a Federal association, the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver of such institution.

(II) In such cases the corporation shall have the same powers and duties with respect to insured institutions as are conferred upon it under subsection (b) of this section with respect to Federal associations.

(ii) (I) The authority conferred by this subparagraph *shall not* be exercised *without the written approval* of the *State official having jurisdiction over the State chartered insured institution* that the grounds specified for such exercise exist. [Emphasis Supplied]

(II) If such approval has not been received by the Board within 90 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the State's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board. The corporation may also proceed without State approval if the Corporation has been appointed conservator, receiver, or other legal custodian pursuant to State law under subparagraph (A)."

Since FHLBB proceeded under the foregoing, the approval of the state official having jurisdiction over petitioner, State Savings and Loan Association, Clovis, New Mexico at the time the approval letter was requested by FHLBB. To determine the identity of that state official, it is necessary to examine the New Mexico statutory law relating to savings and loans.

New Mexico Revised Statute 58-10-71 creates the "Savings and Loan Bureau" and declares that the chief of the bureau shall be the "savings and loan supervisor." New Mexico Revised Statute 58-10-2 (J.) defines "supervisor" as:

"the chief of the savings and loan bureau appointed by, and acting under supervision of the director of the financial institutions division of the commerce and industry department, or the director of the financial institutions division if the position is vacant."

New Mexico Revised Statute 58-10-72 provides that "The supervisor has general supervision over all associations and corporations subject to the provisions of the Savings and Loan Act." It also permits the supervisor to promulgate general regulations for the administration and enforcement of the act and charges him with the responsibility of enforcing the act. Nowhere in the act is the supervisor specifically given any authority to execute the approval required by 12 U.S.C. § 1729(c) (1)(B)(ii)(1) to permit FHLBB's appointment of FSLIC as receiver for a New Mexico chartered savings and loan, rather, that authority is reserved to the district Judge of the District Court having jurisdiction over the savings and loan by New Mexico Revised Statute 58-10-85, and it provides as follows:

"If, in the judgment of the supervisor, the public interest requires it, he may apply to the district court of the county in which the principal office of any association is located for the appointment of a receiver for the association. *The court shall appoint a receiver* as applied for if it finds that either the association's assets in the aggregate do not have a fair value equal to the total liabilities of the association to its creditors and to all holders of savings accounts, or that the association is in violation of any final order of the supervisor and that the alleged violations cannot otherwise be corrected. All proceedings in regard to such applications shall be governed by the laws of this state applicable to receiverships generally. The supervisor, his deputy or an examiner shall not be disqualified from being appointed by the court as a receiver. The receiver, upon

appointment by the court, shall immediately take charge of the affairs of the association, subject to direction of the court, and proceed to conduct the business of the association or to take steps as necessary to conserve the assets and protect the rights of the creditors of the association and its members as may be ordered by the court. *If the association is insured by the federal savings and loan insurance corporation, the corporation may be tendered appointment as receiver or co-receiver.* If it accepts the appointment, it may nevertheless make loans on the security of, or purchase at public or private sale, any part or all of the assets of the association of which it is receiver or co-receiver if the loan or purchase is approved by the court. The directors, officers and attorneys of an association in office at the time of the initiation of any proceeding under this section may contest the proceedings and shall be reimbursed for reasonable expenses and attorney fees by the association or from its assets, the amount of which shall be fixed by the court." [emphasis supplied]

Considering the state of the above cited New Mexico Statutes, the Supervisor could not have executed the required approval for the FHLBB action even prior to his petitioning the Ninth Judicial District Court for Curry County, New Mexico, however, with that act and the act of filing his motion, the Supervisor subjected whatever authority he possessed over State Savings and Loan Association, Clovis, New Mexico, and also his official capacity and himself, to the jurisdiction of that Court. Even if the Supervisor was the "State Official having jurisdiction over the state chartered insured institution" prior to the filing of this Complaint for Appointment of Receiver, thereafter, The *Judge* of the Ninth Judicial District Court of Curry County, New Mexico became the *"State Official having jurisdiction over the State chartered insured institution,"* to-wit: State Savings and Loan Association. That Judge's approval

and signature, not the Supervisor's, was necessary for the FHLBB to proceed under 12 U.S.C. § 1729(c)(1)(B).

The FHLBB appointment of FSLIC as receiver is fatally defective due to the failure to obtain the approval of the appropriate authority and must be set aside.

The foregoing arguments were fairly raised before the Trial Court; were briefed for the Court of Appeals in Issue I.(A)(1) in Appellants Brief; were orally argued by Counsel, and were the principal focus of Petitioner's Motion for Rehearing. It is appropriate for review, if not a summary remand to the District Court with directions to set aside the Summary Judgment and to grant plaintiff's prayer setting aside the unlawful Receivership; to conduct a trial to determine damages to be awarded for the attempted unlawful Receivership.

It matters not that, 90 days having passed since the appointment of a State receiver, the FHLBB could now by unanimous vote of its Board, appoint a receiver without the approval of the State official having jurisdiction over the state chartered insured association, the fact remains that FHLBB acted precipitously without authority and outside the confines of 12 U.S.C. section 1729(c)(1)(B). Since the Federal Home Loan Bank Board has only the authority conferred by statute, this failure vitiates the entire Receivership. The Summary Judgment must be set aside along with the unlawful Receivership and a trial conducted after appropriate discovery to determine State Savings and Loan Association's damages arising from defendant-appellee's unlawful, precipitous acts.

As noted above, the holdings of the lower courts conflict with this Court's denial of certiorari in *Fidelity Savings*, supra. In that case, state law did not explicitly grant the savings and loan commissioner the power to close a state institution. Construing the commissioner's statutory powers broadly, however, the *Fidelity* Court held that the power to close an

association under California law was properly implied from the commissioner's power to take possession of an association for the purpose of liquidation. Having reached this conclusion, the *Fidelity* Court did not sit in judgment on whether the commissioner should have initiated the closure nor did it analyze whether the procedures by which the closure and appointment of a receiver for the state chartered institution was effected complied with state law. The unanswered question of whether the procedures by which the closure was effected complied with state law is of far-reaching importance and should be addressed by this Court.

As argued above, the New Mexico statutes explicitly grant the commissioner the authority to petition the court for the power to place the savings and loan into state receivership, and bestow the court with authority to appoint FSLIC as receiver or co-receiver. It cannot be stated that the Supervisor had any implied power after the New Mexico State Court appointed the Supervisor, in that capacity as Temporary Receiver and denied the Supervisor's plea that he be permitted to tender the Receivership to FSLIC and required the Supervisor to petition the Court for further instructions should further action be needed or indicated. The New Mexico Court clearly retained jurisdiction over State Savings and Loan. New Mexico law clearly subjugates the power of the Supervisor to the supreme authority of the New Mexico Courts relating to Savings and Loans. Therefore, the lower courts have incorrectly applied the law of *Fidelity* in this case.

In addition, it cannot be stated that the New Mexico State Court's requirement that the Supervisor petition the court for further instructions was "substantially a ceremonial formality." *Fidelity,* Id. at 813. As the *Fidelity* Court did not analyze whether the procedures by which the closure was effected complied with state law, this determination is of crucial impor-

tance in this case and therefore, requires review by Writ Of Certiorari.

**3. The Trial Court erred as a matter of law and abused its discretion in denying Petitioner's Motion to Vacate and/or Reconsider Order and for a Rehearing.**

The Trial Court, in its Memorandum Opinion and Order filed on September 17, 1984, erred as a matter of law and abused its discretion in denying Petitioner's Motion to Vacate and/or to Reconsider the Order and for a Rehearing. The decision on which this Order is based, consists of misstatements of law and of the facts of this case.

In the Order of September 17, 1984, the Court stated that Petitioner could not at that time raise the objection that it needed more discovery as a basis for its Motion to Vacate or in the Alternative for Reconsideration and Rehearing because Petitioner had not filed a Motion to Compel under the Federal Rules of Civil Procedure 37(a)(2) until July 18, 1984. This statement is specious and in contravention of the facts in this proceeding as the objections were timely made.

On December 2, 1984, the day the Complaint was filed, Petitioner made an informal request that documents be produced as is urged upon counsel by the local rules. The FHLBB and FSLIC declined to produce documents for examination despite prolonged discussions. On January 26, 1984, Petitioner filed its first document request seeking documents relevant to the proceeding, and filed with this request a Motion for Expedited Discovery, including a request for a discovery conference. The motion was opposed and the trial court denied Petitioner's request for expedited discovery and discovery conference in its Order of February 28, 1984.

On February 28, 1984, the FHLBB and FSLIC filed their response to Petitioner's document request, objecting to some

requests and producing hundreds of documents for examination. Obviously, it would take large amounts of time to examine these documents. After examination of the documents, Petitioner filed its second documents request on May 4, 1984, clearly a timely request well within the limits of discovery. On June 13, 1984, the FHLBB and FSLIC responded to Petitioner's second document request. This second response articulated the position that they would not produce any documents regarding the time period after November 3, 1983, the date that the receiver was appointed for appellant. After careful consideration of these objections, Petitioner filed a Motion to Compel Production of Documents on July 18, 1984, prior to the Court's ruling on the Summary Judgment and three weeks after the FHLBB and FSLIC's response and objections.

The Trial Court never ruled on this latest motion by Petitioner but granted summary judgment and dismissal in its Order of July 31, 1984. As this Order clearly seemed to contravene the facts and law of the case, Petitioner filed a Motion to Vacate this Order and to reconsider or rehear it. This motion was denied by the Court's Memorandum Order of September 17, 1984, on several grounds. One of the grounds for this denial was that Petitioner had waited too long to file its motion to compel. The use of this ground to support the Trial Court's order was an abuse of discretion and an error of law. There is no time limit set, under the Federal Rules of Civil Procedure or under the local rules of the Trial Court, for the filing of a motion to compel. Neither can Petitioner be said to have waived its right to further discovery under an equitable argument. Discovery, in its most efficient utilization, should be totally extra-judicial and the Court should rarely be required to intervene. *Cotton v. Hinton,* 559 F. 2d 1326 (5th Cir. 1977). Thus, Petitioner was correct in its patience in filing a motion to compel with the Trial Court.

In this case, the Trial Court has penalized Petitioner for its conduct during discovery. A decision whether to penalize a party for dilatory conduct during discovery proceedings is committed to the sound discretion of the Trial Court. *Bollow v. Federal Reserve Bank of San Francisco,* 650 F. 2d 1093 (9th Cir. 1981). However, the Trial Court may not abuse that discretion.

As a matter of fact, Petitioner filed its Motion to Compel a mere three weeks after the FHLBB and FSLIC made clear their objection to the production of any documents concerning the period after the appointment of a receiver. It has been held that six weeks' delay in bringing a motion to compel discovery was not unreasonable when the delay was explained by intervening efforts to get the information. *Riley v. United Air Lines, Inc.,* 32 F.R.D. 230 (S.D.N.Y. 1962). In this case, Petitioner engaged in vigorous efforts to obtain additional discovery. And, despite the allegation of the FHLBB and FSLIC in their Opposition to the Motion to Vacate to the contrary, Petitioner's Motion to Compel was not filed after the Court's decision was rendered. The statement of the Trial Court, in its Order of September 17, 1984, that the Trial Court had already taken the Motions for Summary Judgment and to Dismiss under advisement is irrelevant to the ability of Petitioner herein to file its Motion to Compel. In fact, the Motion to Compel may have given the Court additional information helpful in its determination of the pending motions. And, since no hearing was permitted (see discussion, section 3c, below), Petitioner could not know when the trial court had "taken the motions under advisement". Clearly, Petitioner's request for further discovery, reiterated by its Motion to Compel, was timely and to ignore the discovery problems in this case was an abuse of discretion by the Trial Court.

**a. The Trial Court abused its discretion when it stated that Petitioner's objections to the lack of discovery were invalid as a matter of law.**

In addition to being made timely, Petitioner's objections to lack of discovery were valid as a matter of law. The denial of additional discovery and the ignoring by the Trial Court of the need for additional discovery in its decision of the summary judgment and dismissal motions was an error of law. The criteria for ordering disclosure of information pursuant to discovery are (1) whether the party seeking the information has independently attempted to obtain the information elsewhere and has been unsuccessful, (2) whether the information goes to the heart of the matter, (3) whether the information is of certain relevance and (4) the type of controversy involved. *Garland v. Tarre,* 259 F.2d 545 (2d Cir. 1958), cert. den. 358 U.S. 910 (1958). And, under liberal discovery principles of the Federal Rules of Civil Procedure, those opposing discovery are required to carry a heavy burden of showing why discovery should be denied. This burden was not met by the FHLBB and FSLIC in this case.

All of the criteria for disclosure of discovery information in this case were met. First, Petitioner sought the information independently, but was unsuccessful at obtaining it. Moreover, it is obvious that, once a place of business is taken over by an interloper and all of the records of the business taken from the hands of their rightful keepers, the information in those records will be unavailable to those so deposed. In this case, the FHLBB and FSLIC closed the savings and loan and reopened it on their own. Petitioner was thus deprived of any access to these records. Clearly, Petitioner did not have access to the information contained in the records from any other source. These were internal bank records, some of which had to be statutorily kept and all of which were kept in the savings and loan itself. Thus, the first criteria for discovery of relevant information was met.

In addition, the information sought went to the heart of the matter. Petitioner in its Complaint alleged that there was no

basis to appoint a receiver for the savings and loan. The answer, of course, that they did have a proper basis to appoint a receiver for the bank. The question involved in this suit, therefore, hangs on whether the statutory authority to appoint a receiver for the saving and loan existed at the time. Thus, all documents involving the financial health of the savings and loan on November 3, 1983, when a receiver was appointed for the savings and loan, are relevant to the case.

This documentation does not involve only those documents on which the FHLBB and FSLIC relied before they appointed a receiver. Merely because the FHLBB and FSLIC had faulty information on November 3, 1983, would not permit them to continue to hold the savings and loan in receivership in derogation of the rights of the shareholders of the savings and loan. The question is whether the savings and loan was in fact in a condition to justify the decision of the FHLBB regarding its financial health. Thus, financial information generated after the receiver was appointed, which bears on the financial health of the savings and loan at the time the receiver was appointed, is equally as relevant as the information on which the Board in fact depended. If this were not the case, the FHLBB and FSLIC could fabricate enough information to make any savings and loan the subject of receivership. A check on the viability of the information upon which a receivership is based must be permitted in these situations.

The information sought was also relevant to this case. The test for relevance in the discovery area is an extremely broad one; a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action. *Hickman v. Taylor,* 329 U.S. 495 (1947). As the information sought here goes to the heart of the matter, it is clearly relevant to the case herein. Thus, the information sought in discovery by Petitioner meets the third prong of the discoverability test.

Furthermore, the statute which governs the nature or composition of a judicial record that is developed in an action which is brought under 12 U.S.C. § 1464 does not give guidance to the composition of the record. It is significant to note that the former version (now repealed) of said statute provided for an administrative record.

12 U.S.C. § 1464(d)(6)(A) controls and provides as follows:

> "In the event of [the appointment of a conservator or receiver for a savings and loan association], the association may, within 30 days thereafter, bring an action in the United States district court . . . for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator."

It is for the Court to "say what the relevant factors are." *PPG Industries, Inc. v. Costle,* 630 F. 2d 462, 466 (6th Cir. 1980), endorsing *Asarco, Inc. v. EPA,* 616 F. 2d 1153, 1160 (9th Cir. 1980), holding that the reviewing court is "not required to 'take the agency's word that it considered all relevant matters.'" Note in Appellee's Brief on page 3 that Respondents admitted to the Court of Appeals that they had withheld information as follows:

> "On December 28, 1983 the FHLBB filed the administrative record upon which the FHLBB relied in appointing the FSLIC receiver for State, indicating at that time that the FHLBB was withholding certain documents . . ."

In this case the lower courts impermissibly accepted Respondent's version of the administrative record to show the condition of State at the time of the receivership.

Finally, the criteria for discovery may be determined, at least in part, by the type of controversy involved. In this case, a complex set of facts and financial data is questioned as relating

to acts of the United States government. Surely Respondents cannot believably argue in this case that three discovery requests, hundreds of documents, and tens of pleadings, including an amended complaint, should occur within less than six months of each other. Moreover, Respondents are the only party with access to the documents requested and with sole control over them. Thus, this type of case is clearly one in which a vast quantity of complex data must be examined and weighed by both parties. Such a short amount of time as six months is hardly beyond the reasonable bounds of the liberal discovery provided in the federal courts.

Although the trial court has broad discretion in the area of discovery motions, an order in this area is reversible where an abuse of discretion is shown. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). The primary principle of according justice to the litigants is dependent on the ascertainment of underlying facts. *Freeman v. Seligson,* 405 F.2d 1326 (D.C. Cir. 1968). In this case, clearly, justice has not been done to Petitioner; the Trial Court has, in effect, denied Petitioner's rights to ascertain the underlying facts by its grant of a summary judgment and dismissal prior to the complete production of documents by the government. Thus, the facts cannot be ascertained and a grant of summary judgment and dismissal was inappropriate. See also section 3c, below.

**b. The Trial Court erred as a matter of law when it denied Petitioner its due process right to a hearing on the Motion for Summary Judgment.**

A grant of summary judgment is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P., Rule 56. It must be clearly shown there is no genuine issue as to any material fact, and the Movant is entitled to judgment in his favor as a matter of law. *National Screen Service Corp. v. Poster Exchange, Inc.,*

305 F.2d 647 (5th Cir. 1962). The burden is heavy on the party moving for summary judgment to establish clearly his right to such judgment. *Id.* at 651.

The party opposing a motion for summary judgment has a right to a full evidentiary hearing on all genuine issues of material fact. *U.S. v. J.B. Williams Co., Inc.,* 498 F.2d 414 (2d Cir. 1974); The denial of oral argument on a motion for summary judgment should be sparingly applied. *Bowdidge v. Lehman,* 252 F.2d 366 (6th Cir. 1958). Thus, is derived the rule that the trial court may not, by rule or otherwise, preclude a party from requesting oral argument, or deny such request when made by a party opposing such a motion, unless that motion is denied. *Dredge Corp. v. Penny,* 338 F.2d 456 (9th Cir. 1964). In this case, despite Petitioner's request, no oral argument was granted and neither was the Motion for Summary Judgment of Respondents denied. These facts present an abuse of discretion by the Trial Court. The affirmation by the Court of Appeals of the Trial Court's decision not to grant a hearing directly conflicts with the holding of the Ninth Circuit Court of Appeals in *Jasinski v. Showboat Operating Co.*, 644 F. 2d 1277 (9th Cir. 1981) that if a party requests oral argument, Fed. R.Civ.P. 56(c) would have required the district court to grant it. The decisions below should be reviewed because of the conflict with the Ninth Circuit and of the erroneous interpretation of Rule 56(c).

Moreover, such a hearing may not be pro forma only. If the opposing party is deprived of the opportunity to present factual data on which it could have been expected to rely in opposing the motion, the hearing is an empty gesture. *Utility Control Corp. v. Prince William Const. Co., Inc.*, 558 F.2d 716 (4th Cir. 1977). In this case, the consideration of Petitioner's arguments was just such an empty gesture. Petitioner did show material facts in dispute. See argument 3c, below. Moreover, Petitioner was not permitted to create a more extensive body

of fact with which to dispute Respondent's Motion for Summary Judgment. The Trial Court did not permit further discovery, despite Petitioner's showing that the facts requested would be relevant and would produce additional material facts in dispute. The Trial Court, in this case, in fact sanctioned the FHLBB and FSLIC's disregard for the discovery process by permitting their Motion for Summary Judgment to prevail in the face of their own resistance to valid discovery efforts to ascertain the facts. Petitioner has stated on more than one occasion and in many of its pleadings that its inability to obtain the necessary facts from the parties in possession of those records makes it unable to prove its case.

Moreover, the Trial Court in this case was apparently unfamiliar with Petitioner's pleadings. On a motion for summary judgment, to avoid the inherent danger of injustice in granting summary judgment to the moving party on his own version of facts within his exclusive control Fed.R.Civ.P., Rule 56 vests the trial judge with discretion to grant the nonmoving party a continuance to permit him to use discovery to obtain information necessary to show disputed material facts. *Donofrio v. Camp,* 470 F.2d 428 (D.C. Cir. 1972). In this case, Petitioner repeatedly requested additional discovery and filed a Rule 56 (f) affidavit requesting a continuance. But the Trial Judge found in his Memorandum Order filed September 17, 1984, p. 2 that Petitioner never filed a Rule 56 (f) affidavit requesting a continuance for further discovery. Petitioner herein filed such an affidavit and neither a continuance nor a hearing were permitted by the Trial Judge, despite the clear indication that, since Respondents were in sole possession of all of the relevant documents and information, injustice would result from the denial of Petitioner's discovery requests and its request for a continuance based upon its inability to discover relevant facts. The Trial Court abused its discretion in not granting a continuance as the record reflects that Petitioner did not have ample

opportunity prior to the motion for summary judgment to take discovery.

**c. The Trial Court erred as a matter of law when it relied on its own denial of discovery to Petitioner in support of its order granting summary judgment on the basis of Petitioner's supposed inability to provide more than bare allegations in support of its statement of material facts in dispute.**

The Court stated, in its Order of July 31, 1984, that it could not rely on conclusory allegations in pleadings and a failure by the Petitioner to introduce evidence that contradicted the FHLBB's findings. This is, however, a misstatement of the law of summary judgment. The burden of proving there are no material facts in dispute is on the moving party, Respondents, in this case. *United States v. Diebold, Inc.*, 369 U.S. 993 (1962). The Trial Judge, however, moved this burden to the Petitioner in abrogation of this rule of law. Clearly, this is an error of law by the Trial Judge.

Petitioner raised disputed material facts and disputed the facts that Respondents stated were undisputed. See Petitioner's Statement of Genuine Issues, including Response to Federal Government Defendants' Statement of Material Facts as to Which There Can be No Genuine Issue, p. 4, filed February 22, 1984. This statement contested the conditions precedent to appointment of a federal receiver, including Petitioner's insolvency, and controverted the FHLBB's and FSLIC's facts that they had not caused irreparable harm to Petitioner, and that wire transfers were performed not in the ordinary course of business. Petitioner also contested the materiality of the facts put forth by Respondents. Clearly, Petitioner had shown disputed material facts as the basis for the denial of the summary judgment.

The Respondents have stated and the Trial Court has ruled that the documents requested by Petitioner were irrelevant to a

determination of disputed material facts. This is not, however, the case here. The legal question is whether the savings and loan was financially healthy when the FHLBB required a receiver be appointed. The only way to challenge this conclusion by the FHLBB is to show that State was, in fact, financially healthy and, therefore, the FHLBB acted unreasonably. Given that only the Respondents possessed the books and records of the bank, the Respondent's denial of such information to the Petitioner herein, clearly precluded Petitioner from being able to prove its case fully. In addition, by premature action of the court, Petitioner was prevented from seeking to depose the FHLBB members as to the documents produced in discovery and their opinions or beliefs at the time the federal receiver was appointed. Thereby, an injustice was created. The fact that additional information, including an auditor's report on the financial status of the bank, was gathered after the receiver was appointed on November 3, 1983 is irrelevant.

It is not a question of whether Respondents were well-intentioned when they appointed a receiver for the savings and loan but rather, whether they were justified in so doing on the basis of the actual financial state of the savings and loan at that time. Clearly, information derived by either side after the date of the receiver was appointed, if based on information available before the receiver was appointed, is relevant to a determination of the justification of the FHLBB in appointing such a receiver. Therefore, all of the documents requested by Petitioner were relevant and Petitioner's Motion to Compel should have been granted. Indeed, the auditor's report from Touche-Ross, eventually produced by Respondents, revealed that no actual audit, as that term is used in the accounting sense, was conducted, and if the report showed anything, it showed that Petitioner was solvent. Had the FHLBB and FSLIC been forced to produce this report before the Motion for Summary Judgment was ruled upon, Petitioner would have

had additional grounds for its Opposition to Summary Judgment. Thus, a denial of Petitioner's discovery rights was an abuse of discretion by the Trial Court.

**d. The counts of Petitioner's Complaint framing issues for the recovery of damages for the negligent or willful acts of Respondents remained in dispute when the Summary Judgment was granted.**

Moreover, the lower court's decisions completely ignore the holding in *Biscayne Federal Savings & Loan Association v. FHLBB*, 720 F. 2d 1499, (11th Cir. 1983) in the Court's treatment of the claims against the individuals under *Bivens* theories. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 US 388 (1971). As to these claims the issues of "outrageous conduct" by the FHLBB staff and the Supervisor are revelant. There is no evidence in the record to support the lower court's improper grant of summary judgment with these damage claims outstanding. The fact that the *Bivens* claims are or may be irrelevant to the determination of whether or not the statutory grounds for a receivership existed cannot support an award of summary judgment. Therefore, even if the receivership should be upheld, this portion of the case should be reversed and remanded for a trial on the damage claims.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that Petitioner's Writ of Certiorari has been delivered and served on the following:

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William K. Black
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by depositing a copy of the same in the U.S. Mails, first class postage prepaid, return receipt requested on this 31 day of October, 1985.

William E. Gahn

# APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE SAVINGS AND LOAN ASSOCIATION,

*Plaintiff,*

*v.*

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION AND SNIDER CAMPBELL,

*Defendants.*

Civil Action No. 83-3611

## MEMORANDUM OPINION

State Savings and Loan Association (State), a New Mexico corporation, filed this action against the Federal Home Loan Bank Board (Board), the Federal Savings and Loan Insurance Corporation (FSLIC), and Snider Campbell, Savings and Loan Supervisor for New Mexico. State brings this action to challenge the Board's appointment of the FSLIC as receiver for State. Before the court at this time are the federal defendants' motion for summary judgment and defendant Campbell's motion to dismiss.

State was a savings and loan association located in Clovis, New Mexico, chartered under the laws of New Mexico, and insured by the FSLIC. State was subject to regulation by the Board and by the Savings and Loan Bureau in the Financial Institutions Division, Regulation and Licensing Department of New Mexico. The record indicates that State had experienced financial difficulties during the two and a half years preceding the establishment of the receivership and that State's manage-

ment undertook a number of measures in an attempt to stabilize State. Administrative Record as filed with this court on December 28, 1983 (hereinafter Admin. Rec.). During the spring and summer of 1983, both Supervisor Campbell and the Board issued orders against State charging regulatory violations.[1] On November 2, 1983 the New Mexico District Court for the County of Curry entered an order appointing Supervisor Campbell as temporary receiver for State after finding that it appeared that "State's assets in the aggregate do not have a fair value equal to its total liabilities to its creditors and to all holders of savings accounts." *Campbell v. State Savings and Loan Assoc.*, No. 83CV28979 (Temporary Restraining Order and Appointment of Temporary Receiver) (November 2, 1983) (hereinafter TRO). Pursuant to that order, Supervisor Campbell processed withdrawals from matured savings accounts until he could no longer do so at approximately 1:00 p.m. on November 3, because State no longer had enough cash. Aff. of Eva Lee Hicks; Aff. of Russell Miller.

On November 3, 1983, the Board met and appointed the FSLIC as receiver of State pursuant to 12 U.S.C. § 1729(c)(I)(B). The Board found that three grounds existed for making the appointment: (1) State was insolvent; (2) State

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[1] Supervisor Campbell issued an emergency cease and desist order on April 1, 1983. Admin. Rec., at 59. In June, the Board issued a Temporary Order to Cease and Desist and Accompanying Notice of Opportunity for Hearing against State. *Id.*, at 142-147. On August 19, 1983, State and the Board entered into a consent cease and desist order which prohibited State from violating specific sections of the Insurance Regulations which required maintenance of accurate and complete records for transactions, 12 C.F.R. Part 563, placed restrictions on the future purchase of time-share notes, and prohibited Hollis Grissom, President of State, from exercising control of more than 24.99% of State's outstanding stock. *Id.*, at 126-34.

had incurred a substantial dissipation of its assets and earnings due to violations of regulations and unsafe and unsound business practices; and (3) State was in an unsafe and unsound condition to transact business. Board Resolution No. 83-609. Supervisor Campbell notified the Board that he concurred in the Board's findings. Letter from Supervisor Campbell to the Board (November 3, 1983). The FSLIC then assumed possession and control of State and began the liquidation.

On December 2, 1983, State filed this action for removal of the receiver pursuant to 12 U.S.C. § 1464(d)(6)(A), and an amended complaint containing five counts was filed on June 14, 1984.[2] The plaintiff in its amended complaint claims: (1) the statutory conditions for the appointment of a receiver were not met; (2) the Board improperly appointed the FSLIC as a receiver pursuant to 12 U.S.C. § 1729(c)(1)(B)(ii)(I); (3) the defendants engaged in actions designed to precipitate the financial downfall of State; (4) the defendants arbitrarily and capriciously misused their authority to deny State its constitutional due process rights; and (5) State is entitled to compensatory and punitive damages for the wrongful taking of its property and deprivation of its due process rights. The plaintiff seeks appointment of a Special Master to conduct an audit, removal of the FSLIC as receiver, return of the assets of State to its shareholders, an injunction against further dissipation of State's assets, an accounting of those assets already dissipated, and an award of costs, attorney's fees, and actual and treble damages.

The federal defendants have filed a motion and a supplemental motion for summary judgment on each of these counts. Defendant Campbell has filed a motion to dismiss the claims against him for lack of subject matter jurisdiction, failure to

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[2] Leave to file an amended complaint was granted by this court in our Memorandum Order of June 6, 1984.

state a cause of action, lack of personal jurisdiction, and failure to effect proper service of process. Having considered the extensive record in this case and the memoranda of all parties, we grant both of these dispositive motions and dismiss this action with prejudice.

## DISCUSSION

The plaintiff filed this action under 12 U.S.C. § 1464(d)(6)(A) and under the Fifth and Fourteenth Amendments. Section 1464(d)(6)(A) provides that "[i]n the event of such appointment [of the FSLIC as receiver], the association may, within thirty days thereafter, bring an action . . . for an order requiring the Board to remove such conservator or receiver, and the Court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver." 12 U.S.C. § 1464(d)(6)(A). That requires us to determine whether the proper procedures were followed in establishing the receivership and whether statutory grounds for appointment existed at the time the FSLIC was appointed receiver. The plaintiff does not challenge the constitutionality of the statutory procedure for appointing a receiver under 12 U.S.C. § 1464(d)(6)(A) or 12 U.S.C. § 1729(c)(1)(B), and courts are in agreement that the procedure is constitutional. *See, e.g., Fahey v. Mallonee,* 332 U.S. 245 (1947); *Fidelity Savings and Loan Ass'n v. Federal Home Loan Bank Board,* 689 F.2d 803, 814 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 1893 (1983).

The defendants argue that the only proper claims in this action are those brought under 12 U.S.C. § 1464(d)(6)(A) against the Board. We agree that this is the plaintiffs' exclusive remedy, since State has challenged only the application of the statutory procedures by the Board in this case. The statute itself confirms this conclusion, stating that "[e]xcept as other-

wise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." 12 U.S.C. § 1464(d)(6)(C). The plaintiff's allegations in counts III-IV are relevant to this action and have been considered by this court in connection with the plaintiff's § 1464(d)(6)(A) claim to determine whether proper procedure was followed in appointing the FSLIC as receiver and whether the Board acted reasonably in concluding that the statutory grounds for appointment existed. *Manning Savings and Loan Ass'n v. FSLIC,* Civil Action No. 83C 757 (N.D. Ill. Sept. 14, 1983) (Memorandum Opinion).

Additional support for our conclusion that an action against the Board under § 1464(d)(6)(A) is the plaintiff's exclusive remedy can be found in general receivership law. Those courts which have addressed the issue have concluded that upon appointment of the FSLIC as receiver, a savings and loan association loses the power to maintain legal action other than that authorized under § 1464(d)(6)A). *Manning Savings and Loan Ass'n,* at 7; *First Savings & Loan Ass'n v. First Federal Savings and Loan Ass'n,* 531 F. Supp. 251, 255-56 (D. Hawaii 1981); *First Savings and Loan Ass'n v. First Federal Savings and Loan Ass'n,* 547 F. Supp. 988, 994 (D. Hawaii 1982).

Based on this analysis we reach two conclusions. First, we dismiss the claims against Supervisor Campbell since § 1464(d)(6)(A) does not authorize an action against the New Mexico official. State lacks the capacity to bring the claims against Campbell unless it prevails in having the FSLIC removed as receiver pursuant to State's § 1464(d)(6)(A) claims against the Board. *Manning Savings and Loan Ass'n,* at 8. Secondly, in considering the federal defendants' motion for summary judgment, we are presented with two issues only: (1) whether the Board followed the statutory procedures in ap-

pointing the FSLIC as receiver; and (2) whether the statutory requirements for appointment existed at the time of the appointment.

### 1. Procedures for the Appointment of the FSLIC as Receiver

The Board appointed the FSLIC as receiver of State pursuant to 12 U.S.C. § 1729(c)(1)(B). Section 1729(c)(1)(B) provides that:

> Notwithstanding any provision of the constitution or laws of any State, or of this section, in the event the Federal Home Loan Bank Board determines that any of the grounds specified in section 1464(d)(6)(A)(i), (ii), or (iii) of this title exist with respect to an insured institution, other than a Federal association, the Board shall have exclusive power and jurisdiction to appoint the Corporation [FSLIC] as sole conservator or receiver of such institution.

12 U.S.C. § 1729(c)(I)(B)(i)(I). To exercise this authority, the Board must receive "the written approval of the State official having jurisdiction over the state-chartered institution that the grounds specified for such exercise exist." 12 U.S.C. § 1729(c)(1)(B)(ii)(I).

State contends that the FSLIC could be properly appointed only under § 1729(c)(2). Section 1729(c)(2) establishes authority for the Board to appoint the FSLIC when: (1) fifteen days have passed since the appointment of a receiver by one other than the Board or the institution was closed under the laws of a state; (2) one or more of the grounds under § 1464(d)(6)(A) exist; and (3) someone is unable to obtain a withdrawal of his account. State argues that this procedure is

required to be followed since the New Mexico District Court had already appointed Supervisor Campbell as temporary receiver of State. We disagree. Nothing in § 1729(c)(1)(B) suggests that its application is limited to those situations in which no other receiver had been appointed. The language of § 1729(c)(1)(B) in fact suggests the opposite since it is applicable "notwithstanding" other provisions of the section.

The rationale and legislative history of these provisions also support the application of § 1729(c)(1)(B) in this case. Section 1729(c)(2) provides the Board with the means of establishing the FSLIC as receiver when a state may be hostile to the Board's efforts. *Fidelity Savings and Loan Ass'n,* 689 F.2d at 812. The additional requirements for appointment under (c)(2) were provided to protect the states from unnecessary federal interference. That purpose in § 1729(c)(2) is not defeated by applying § 1729(c)(1)(B) in this case since a receiver may be appointed under (c)(1)(B) only with the written approval of the appropriate state official. Section 1729(c)(1)(B) does authorize the Board to appoint the FSLIC as receiver in cases where it previously could not, but § 1729(c)(1)(B) was added in October, 1982 to provide the Board with that additional authority in response to the financial difficulties in the savings and loan industry. Therefore, we conclude that the Board acted properly in following the procedures of § 1729(c)(1)(B) to establish the FSLIC as receiver.

### 2. Satisfaction of the Statutory Requirements for the Appointment of a Receiver

Under § 1729(c)(1)(B) the Board has authority to appoint the FSLIC as receiver if it determines that one of the grounds specified in § 1464(d)(6)(A)(i)(ii) or (iii) are present and an appropriate state official provides written approval. The plaintiff contends that none of these requirements was satisfied when the Board appointed the FSLIC. Upon consideration of

the extensive record in this case, we have concluded that no material facts are in dispute and that summary judgment should be granted for the federal defendants.

The Board determined that all three grounds for the appointment of the FSLIC were present on November 3, 1983. Board Resolution No. 83-609. Those grounds are:

> (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business.

12 U.S.C. § 1464(d)(6)(A). The issue for us is whether one of these conditions existed at the time the FSLIC was appointed. *Telegraph Savings and Loan Ass'n v. FSLIC,* 564 F. Supp. 862, 870 (N.D.Ill. 1981), *aff'd.,* 703 F.2d 1019 (7th Cir.), *cert. denied,* 104 S. Ct. 484 (1983). Summary judgment may be granted if "there were facts before the Board, when it acted, on which the Board could reasonably have concluded that 'a' statutory ground existed for the appointment of a receiver." *Biscayne Federal Savings & Loan Ass'n. v. Federal Home Loan Bank Board,* 720 F.2d 1499, 1505 (11th Cir. 1983), *cert. denied,* 52 U.S.L.W. 3860 (May 29, 1984); *see also Washington Federal Savings and Loan Ass'n v. Federal Home Loan Bank Board,* 526 F. Supp. 343 (N.D. Ohio 1981).

The Board determined that State was insolvent on November 3, 1983, one of the grounds authorizing the appointment of a receiver. The Board made this determination based on the findings of Board Examiners that State's liabilities exceeded its assets by at least $32,617 and possibly as much as $1 million. Memorandum from Jack W. Pullen, Acting Director of

Office of Examinations and Supervision to J. J. Finn, Secretary to the Board (Oct. 31, 1983). State denies that it was insolvent. Amended Complaint, at ¶ 9. However, State can not rely on the conclusory allegations of its pleadings, and State has failed to introduce any evidence that contradicts the findings of the Board Examiners.[3] *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289 (1968). Therefore, we find that the Board had a reasonable basis for concluding that State was insolvent on November 3, 1983.

We also are convinced that the record supports the Board's conclusion that the second and third grounds authorizing appointment also existed. Since only one of the three grounds is necessary to authorize the appointment of the FSLIC under § 1729(c)(1)(B), we will not repeat the detailed evidence which is part of the record in support of the Board's determination. We conclude that the wire transfer of $12.6 million was not adequately documented thereby being in violation of regulations and the outstanding cease and desist order, and that the Board was reasonable in determining that a "substantial dissipation of assets or earnings" would result. While plaintiff has raised disputed facts about that transaction, they are not material to our determination that this second ground for appointment of the FSLIC is amply supported by the record. We also conclude that the Board acted reasonably in determining that State's inability to continue processing withdrawals on matured accounts on November 3, 1983 was an "unsafe or

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[3] The conclusory statement of Hollis Grissom, President of State, in his affidavit of February 20, 1984, unsupported by specific facts can not create an issue of disputed fact or prevent summary judgment. Gebhard v. GAF Corp., 59 F.R.D. 504, 508 (D.D.C. 1973). The affidavits of Gary Bender and Hollis Grissom (June 28, 1984) take issue with the auditing practice of Examiners for New Mexico, but the Board based its decision on the audit of its own Examiners. Admin. Rec., at 218-19.

unsound condition to transact business," the third ground authorizing the appointment. Again the plaintiff denies the factual accuracy of this conclusion, but again it fails to provide evidence which would place this issue in genuine dispute. Similarly, State's explanation that Supervisor Campbell's actions led to its inability to process withdrawals is no more than a bare allegation unsupported by the facts in the record.

The final precondition for appointing the FSLIC as receiver was the written approval of an appropriate official in New Mexico. Supervisor Campbell gave that approval concurring in the Board's findings that the three grounds for appointment existed. Letter from Supervisor Campbell to the Board (Nov. 3, 1983). State argues that Campbell was without power to consent to the appointment of the FSLIC. The Order of the New Mexico Court, which appointed Campbell as temporary receiver of State, deleted those portions of the proposed order which expressly granted Campbell the authority to tender the receivership to the FSLIC. TRO, at 5. That deletion however, did not preclude the Board from seeking the written approval of Campbell as the Savings and Loan Supervisor for the State of New Mexico with jurisdiction over all state-chartered insured savings and loan associations in New Mexico. *See* Letter of Assistant Attorney General Ellen Souberman to Judy Gunderson of the Board's Office of General Counsel (Oct. 31, 1983). Since nothing in the Order of the New Mexico Court enjoined Campbell from exercising the authority which he already possessed as Supervisor, we conclude that the written approval provided by Supervisor Campbell satisfied the requirements of § 1729(c)(1)(B)(ii)(I).

In summary, we hold that the Board properly appointed the FSLIC as receiver of State on November 3, 1983. Therefore, we grant the federal defendant's motion for summary judgment and dismiss this action with prejudice.

An order consistent with the foregoing has been entered this day.

/s/ JOHN H. PRATT
John H. Pratt
*United States District Judge*

July 31st, 1984.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| STATE SAVINGS AND LOAN ASSOCIATION,<br>*Plaintiff,*<br>v.<br>FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS & LOAN INSURANCE CORPORATION, AND SNIDER CAMPBELL,<br>*Defendants.* | Civil Action No. 83-3611[1] |

## ORDER

Upon consideration of defendant Campbell's motion to dismiss and the federal defendants' motion for summary judgment the memoranda of all parties, and the entire record, and for the reasons set out in our accompanying Memorandum Opinion, it is by the court this 31st day of July, 1984,

ORDERED that the federal defendants' motion for summary judgment be and the same hereby is granted, and it is

ORDERED that defendant Campbell's motion to dismiss be and the same hereby is granted, and it is

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[1] File stamped July 31, 1984.

FURTHER ORDERED that this action be and the same hereby is dismissed with prejudice.

/s/ J. H. PRATT

John H. Pratt

*United States District Judge*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE SAVINGS & LOAN ASSOCIATION,

*Plaintiff,*

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,

*Defendants.*

Civil Action No. 83-3611[1]

## MEMORANDUM ORDER

Before the court at this time is the plaintiff's motion to vacate and/or to reconsider order and for a rehearing. The plaintiff seeks to have us reconsider our memorandum opinion and order of July 31, 1984 which granted the federal defendants'[2] motion for summary judgment and Snider Campbell's motion to dismiss. The plaintiff contends that it should have been permitted further time for discovery to establish that none of the statutory conditions for appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver existed on November 3, 1983 when the receivership was established. 12 U.S.C. § 1464(d)(6)(A). We conclude that the plaintiff's motion is without merit.

The plaintiff never at any time filed a motion to compel discovery until July 18, 1984, after the defendants' dispositive

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[1] File stamped September 17, 1984

[2] The federal defendants are the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation.

motions were taken under consideration by this court.[3] The plaintiff's memoranda in opposition to those motions never indicated that further discovery was required to provide a fuller opposition, and the plaintiff never filed a Rule 56(f) affidavit requesting a continuance for the purpose of further discovery. The plaintiff never did any of these things despite having this court grant its request to amend its complaint and having an opportunity to file supplemental memoranda in opposition to the dispositive motions. Memorandum order of June 6, 1984. Now that we have granted the federal defendants' motion for summary judgment and defendant Campbell's motion to dismiss, the plaintiff can not for the first time raise the objection that further discovery is needed. In addition, the plaintiff already has had extensive discovery and has failed to establish that further discovery is relevant to the dispositive issue of whether one of the statutory conditions existed at the time the FSLIC was appointed. Memorandum opinion, at 8-9 (July 31, 1984). Its lack of diligence can not now provide a basis for this court to vacate or reconsider our decision granting the defendants' dispositive motions. *Zerilli v. Smith*, 656 F.2d 705, 716 (D.C.Cir. 1981).

The plaintiff also argues that it was entitled to a hearing as a matter of right. Because we found that no material facts were in dispute, no trial was necessary to resolve the dispositive issues. Memorandum opinion, at 9-11 (July 31, 1984). Whether an oral hearing is to be held is "within the sole discretion of the court." Local Rule 1-9(f). Therefore, our decision not to conduct a hearing is no basis for granting the plaintiff's

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[3] In our order of February 28, 1984 denying the plaintiff's motion for expedited discovery and request for an order convening a discovery conference, we stated that "[i]f plaintiff objects to the defendants' decision to withhold particular documents, it should file an appropriate motion under Rule 37(a)(2) of the Federal Rules of Civil Procedure." Order (February 28, 1984).

present motion. Finally, we find that State Savings & Loan Association was an insured institution on November 3, 1983 subjecting it to regulation by the Federal Home Loan Bank Board. Certification of Insurance, No. 4635.

Based on the foregoing, it is by the court this 14th day of September, 1984,

ORDERED that plaintiff's motion to vacate and/or reconsider and for a rehearing be and the same hereby is denied.

/s/ J. H. PRATT
John H. Pratt
*United States District Judge*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| STATE SAVINGS & LOAN ASSOCIATION, Clovis, New Mexico<br>*Plaintiff*<br>v.<br>FEDERAL HOME LOAN BANK BOARD, *et al.*,<br>*Defendants* | Civil Action No. 83-3611<br>Judge Pratt |

## NOTICE OF APPEAL

Notice is hereby given that State Savings and Loan Association, Clovis, New Mexico, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of the United States District Court for the District of Columbia dated September 14, 1984, a copy of which is attached.

Respectfully submitted,

/s/ JAMES J. GROSS

JAMES J. GROSS, ESQ.
Amram and Hahn, P.C.
1155 Fifteenth Street, NW
Suite 1100
Washington, DC 20005
(202) 783-3344
Attorney for Plaintiff

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 19th day of September, 1984 to:

HARVEY SIMON, ESQUIRE
Associate General Counsel
Federal Home Loan Bank Board
Office of General Counsel
1700 G Street, NW
Washington, DC 20552
Attorney for Defendants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corp.

PAUL BARDACKE, ESQUIRE
New Mexico Attorney General
Post Office Drawer 1508
Santa Fe, NM 87504-1508
Attorney for Defendant Campbell

/s/ JAMES J. GROSS

JAMES J. GROSS, ESQ.
Amran and Hahn, P.C.
1155 Fifteenth Street, NW
Suite 1100
Washington, DC 20005
(202) 783-3344
Attorney for Plaintiff

# APPENDIX II

**NOT TO BE PUBLISHED • SEE LOCAL RULE 8(f)**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

**No. 84-5662** **September Term, 1984**

STATE SAVINGS & LOAN ASSOCIATION,
*Appellant*
v.
FEDERAL HOME LOAN BANK BOARD, *et al.*

Civil Action No. 83-3611[1]

*Appeal from the United States District Court for the District of Columbia*

Before WRIGHT, TAMM, and WALD, Circuit Judges.

## JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. This court has fully considered the issues presented; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum Opinion filed July 31, 1984, *reproduced in* Joint Appendix (JA) at 238-248, and in its Memorandum Order filed September 17, 1984, *reproduced in* JA at 250-252.

[1] This was file stamped on May 17, 1985.

On consideration of the foregoing, its is ORDERED and ADJUDGED by this court that the judgment of the District Court from which this appeal was taken is hereby affirmed.

It is FURTHER ORDERED by this court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
*Clerk*

2

[2] Notation that the Bill of Costs must be filed.

# APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 84-5662** **September Term, 1984**

STATE SAVINGS AND LOAN ASSOCIATION

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

CA No. 83-03611[1]

BEFORE: Wright, Tamm and Wald, Circuit Judges

**ORDER**

Upon consideration of appellant's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT
GEORGE A. FISHER, CLERK

/s/ ROBERT A. BONNER
BY: Robert A. Bonner
Chief Deputy Clerk

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[1] File Stamped on June 21, 1985.

# APPENDIX IV

NINTH JUDICIAL DISTRICT COURT
COUNTY OF CURRY
STATE OF NEW MEXICO

SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institution Division, Regulation and Licensing Department, State of New Mexico,

*Plaintiffs,*

v.

STATE SAVINGS AND LOAN ASSOCIATION,
A New Mexico Corporation,

*Defendant.*

No. 83-CV-28979

## CERTIFICATE OF AUTHENTICATION

UNITED STATES OF AMERICA
STATE OF NEW MEXICO
COUNTY OF CURRY } ss.

I, Linda Worley, Clerk of the District Court within and for the County of Curry, State of New Mexico, do hereby certify that the attached and foregoing is a true and complete copy of Docket Sheet as of 06/07/85; Complaint for Appointment of a Receiver; Motion for Temporary Restraining Order and Immediate Appointment of Temporary Receiver; and Temporary Restraining Order and as the same appears of record in the above-entitled cause in said court. Appointment of Temporary Receiver

IN WITNESS WHEREOF, I have hereunto set may hand and Seal of said Court this 7th day of June, 1985.

(SEAL)

/s/ LINDA WORLEY
CLERK OF THE DISTRICT COURT

UNITED STATES OF AMERICA
STATE OF NEW MEXICO
COUNTY OF CURRY
} ss.

I, the undersigned Judge of the District Court within and for the County of Curry, State of New Mexico, do hereby certify that on the 7th day of June, 1985, Linda Worley was the duly appointed and acting Clerk of the District Court within and for the County of Curry, State of New Mexico, and that I am familiar with the signature of the said Linda Worley and that the foregoing signature is genuine, and the foregoing attestation of the said as Clerk of said Court, is in due and proper form.

IN WITNESS WHEREOF, I have hereunto set my hand and Seal of said Court this 7th day of June, 1985.

/s/ REUBEN E. NIEVES
DISTRICT JUDGE

(SEAL)

UNITED STATES OF AMERICA
STATE OF NEW MEXICO } ss.
COUNTY OF CURRY

I, Linda Worley, Clerk of the District Court within and for the County of Curry, State of New Mexico, do hereby certify that on the 7th day of June, 1985, Reuben E. Nieves was the duly elected, qualified, and acting Judge of the District Court within and for the County of Curry, State of New Mexico, which is a Court of Record, and the above and foregoing signature of said Judge is genuine and that the Seal of said Court is in my custody, and I hereby verify that the Seal of said Court which is attached hereto, is in due and proper form.

IN WITNESS WHEREOF, I have hereunto set my hand and Seal of said Court this 7th day of June, 1985.

(SEAL)

/s/ LINDA WORLEY
CLERK OF THE DISTRICT COURT

# CIVIL DOCKET—STATE OF NEW MEXICO

Computer ID 02 05 17 -/ 83 28679

Date Reopened _____ Date of Filing 11-1-83

PLAINTIFF(S) (In the Matter of)

SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico.

vs. (In Re.)
DEFENDANT(S)

STATE SAVINGS AND LOAN ASSOCIATION, A New Mexico Corporation

ATTORNEYS

For Plaintiff(s) _____
Schoen and Soubesman, Asst. Attorneys General

For Defendant(s) _____

Fee $ NC Receipt No.

CONDEMNATION TRACTS

CATEGORY/SUBCATEGORY JUDGE'S CODE JUDGE'S NAME 2nd JUDGE 2nd JUDGE

Miscellaneous CODE 0901 Nieman _____ _____

Appr. of Receiver DESCRIPTION

TYPE APPEAL
1 ☐ Magistrate
2 ☐ Municipal
3 ☐ Administrative
4 ☐ Other

TYPE OF TRIAL
1 ☐ Non-Jury
2 ☐ 12 Person Jury
3 ☐ 6 Person Jury
12 ☐ Mistrial or Hung Jury
17 ☐ Special Master or Hearing Officer

DISPOSITION TYPE
1 ☐ Default
2 ☐ Stipulated Judgment or Agreement
3 ☐ Judgment on Hearing or Trial
4 ☐ One Year Dismissal
5 ☐ Other Dismissal
6 ☐ Other Disposition
7 ☐ Summary Proceeding

DATE OF FINAL HEARING _____

DATE FINAL ORDER FILED _____

| DATE | | PROCEEDINGS | MISC. | INDEX |
|---|---|---|---|---|
| 11-1-83 | 8:01 AM | Complaint for Appointment of a Receiver cv | | |
| 11-1-83 | 8:03 AM | Motion for Temporary Restraining Order and Immediate Appointment of Temporary Receiver cv | | |
| 11-1-83 | | Summons Issued cv | | |
| 11-1-83 | 11:02 AM | Order cv | | |
| 11-1-83 | 11:09 AM | Motion to Quash Service of Process cv | | |
| 11-1-83 | 2:39 PM | Affidavit cv | | |
| 11-1-83 | | Summons Issued (6) cv | | |
| 11-1-83 | 3:05 PM | Return of Service (filed in open court) cv | NC | |
| 11-1-83 | 4:15 PM | Notice of Hearing (11-2-83, 10 am) cv | | |
| 11-2-83 | 8:28 AM | Return of Service (3) cv | | |
| 11-02-83 | 2:08 PM | Temporary Restraining Order and Appointment of Temporary Receiver ln | | |
| 11-02-83 | 10:00 AM | Motion to Dismiss for Failure to Follow Proper Statutory Procedures ln | | |
| 11-02-83 | 10:00 AM | Motion to Deny Temporary Restraining Order or Appointment of Temporary Receiver ln | | |

| DATE | PROCEEDINGS | MISC. | INDEX |
|---|---|---|---|
| 01/23/85 | 11:17 AM Motion to Compel Production of Books and Records and for an Accounting by the Temporary Receiver, Snider Campbell and his unlawful Delegate and/or for Removal of said Temporary Receiver and Federal Savings and Loan Insurance Corporation, his unlawful Delegate (1mm) | | |
| 02/06/85 | 11:47 AM Opposition to Motion for Discovery and/or Removal of Temporary Receiver (1mm) | | |
| 02/06/85 | 11:46 AM Motion to Dismiss (1mm) | | |
| 02/06/85 | 11:47 AM Memorandum of Points and Authorities in Support of Motion to Dismiss (1mm) | | |

STATE OF NEW MEXICO
COUNTY OF CURRY
IN THE DISTRICT COURT

SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico

*Plaintiff,*

vs.

STATE SAVINGS AND LOAN ASSOCIATION, a New Mexico Corporation,

*Defendant.*

No. 83CV38979[1]

## COMPLAINT FOR APPOINTMENT OF A RECEIVER

### JURISDICTION AND VENUE

1. Plaintiff Snider Campbell is the duly qualified, appointed and acting supervisor of the Savings and Loan Bureau, Financial Institutions Division, Regulation and Licensing Department of the State of New Mexico (Supervisor) and pursuant to the New Mexico Savings and Loan Act, Section 58-10-1 *et seq.* NMSA 1978 (Savings and Loan Act) exercises general regulatory and supervisory authority over all state chartered savings and loan associations in New Mexico.

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[1] File stamp appeared here.

2. Defendant State Savings and Loan Association (State) is a New Mexico chartered savings and loan association with permanent capital stock established and chartered pursuant to the Savings and Loan Act. State is subject to the Savings and Loan Act and to the lawful regulations promulgated by the Supervisor pursuant to the Savings and Loan Act. (Regulations *S&LB)*.

3. State is a member of the Federal Home Loan Bank system and is subject to the provisions of the Federal Home Loan Bank Act, 12 U.S.C. Sections 1421 *et seq.*, and the Federal Home Loan Bank Systems Regulations, 12 C.F.R. Sections 521.1 *et seq.*

4. State's accounts are insured by the Federal Savings and Loan Insurance Corporation (FSLIC) pursuant to Title IV of the National Housing Act, 12 U.S.C. Sections 1724 *et seq.*, and State is subject in all respects to that Title and to the Rules and Regulations for Insurance of Accounts, 12 C.F.R. Sections 561.1 *et. seq.* (the FSLIC Insurance Regulations).

5. This Court has jurisdiction pursuant to the Savings and Loan Act, Section 58-10-85, and Section 53-16-16 of the New Mexico Business Corporations Act, Sections 53-16-1 *et seq.* NMSA 1978.

6. Venue for this action, as provided in Section 58-10-85 NMSA 1978 of the Savings and Loan Act, is proper in the county where State's principal office is located. State's principal office is located in Clovis, Curry County, New Mexico.

7. The basis for this action is the Supervisor's judgment that the public interest requires the appointment of a receiver for State because State's assets in the aggregate do not have a fair value equal to its total liabilities to its creditors and to all holders of savings accounts, and because the appointment of a receiver is necessary in order to conserve State's assets and to

protect the rights of the depositors and other creditors of State.

## CLAIM FOR RELIEF

8. State is required by the Savings and Loan Act, the duly promulgated regulations of the Supervisor, and the regulations of the Federal Home Loan Bank Board and FSLIC to maintain a net worth of $448,305.00 during the period from January 1, 1983 through December 31, 1983.

9. As of September 30, 1983 State's reported net worth was $422,137.00; as of October 25, 1983, State's net worth on its own books had declined to $102,459.00. The said $102,459.00 amount includes in excess of $130,000.00[1] of capitalized expenses and specific loss reserves, which in accordance with generally accepted accounting principles should not be so included.

10. State incurred a net operating loss of $206,771.00 for the month of September, 1983. From September 30, 1983 to October 25, 1983, State incurred an additional operating loss of $319,678.00.

11. State's assets in the aggregate do not have a fair value equal to State's total liabilities to its creditors and to all holders of State savings accounts in that:

a. State has over six million dollars in time share contracts reported as assets on its books. In connection with a June, 1983 regular examination of State ordered by the Supervisor, confirmation letters were sent to each borrower

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[1] Original petition has the figure of $130,000 lined out and the figure $77,000.00 penned in above the line and initialed "SC."

on said time share contracts. Thirty percent of the responses[2] received indicate as follows:

(1) 24 persons responded that their contracts had been paid in full,

(2) 26 persons responded that they did not have a loan on the contracts indicated,

(3) 36 persons responded that their loan contracts had been cancelled,

(4) 26 persons responded that no payments were being made on the loan contracts due to alleged misrepresentations in connection with the making of the loan contract or for other reasons.

The total amount of the contracts referred to in (1) through (4) of subparagraph a. herein is $561,251.27. Therefore, the amount of the time share contracts shown as an asset on State's books has a fair value at least $561,251.27 less than the book value reported by State.

b. As a result of the regular examination ordered by the Supervisor in June, 1983, the Supervisor has determined that there is a discrepancy of at least $617,775.59 between the amounts reported by State as receivables on the time share contracts referred to in subparagraph a. herein and the total amounts reported as due to State by the assignor and seller, Southwest Mortgage Service Corporation. The book value of the time share contracts should therefore be reduced by the amount of at least $617,775.59 which is the amount overstated on the general ledger sheet of State.

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[2] Original has phrase "thirty percent of the responses" lined out and the word "Responses" penned in above the line and initialed "SC."

c. As a result of the regular examination ordered by the Supervisor in June, 1983, the Supervisor has determined that State has overstated the amount of accrued interest received on the time share contracts referred to in subparagraph a. herein by the amount of $19,884.00. State's net worth as reported by State should be reduced by the amount of $19,884.00 which represents over-accrued interest.

d. State reports its liability on jumbo savings certificates in the June, 1983 examination ordered by the Supervisor as $16,403,988.00. As a result of his examination the Supervisor has determined that State has understated its liability on jumbo savings certificates by $23,513.00. The liabilities of State should therefore be increased by the amount of $23,513.00.

e. State has included in the calculation of its net worth as shown in the June, 1983 examination the amount of $122,500.00 which represents delinquent interest accrued by State on real estate owned by foreclosure. The $122,500.00 delinquent interest payments should be written off rather than capitalized as real estate owned and the book value of State's real estate owned by foreclosure reduced by this amount.

f. State has capitalized joint venture expenses of $6,255.00 in connection with a joint venture agreement between State and Thomas L. Hartley d/b/a Eaton Investors as a "real estate owned" asset of State in its June, 1983 examination. Such expenses should not be capitalized and the book value of the State's real estate owned should be further reduced by $6,255.00.

12. The total of items 11(a) through (f) is $1,351,178.86; said amount should be deducted from State's net worth, thereby rendering State insolvent.

13. The Supervisor therefore seeks the appointment of a receiver for State pursuant to Section 58-10-85 NMSA 1978 of the Savings and Loan Act.

14. The Supervisor proposes that the Court appoint him as receiver since he is not disqualified from acting in that capacity by Section 58-10-85 of the Savings and Loan Act. The Supervisor has supervised examinations of State and he is therefore familiar with its circumstances. He is also already bonded in his capacity as a State employee. Finally, the Supervisor has served as the receiver for three other New Mexico chartered savings and loan associations.

15. The Supervisor seeks to have the Court order him, in his capacity as receiver and subject to the direction of the Court, to take charge of the affairs of State to conduct its business, and to take whatever steps are necessary to conserve its assets and to protect the rights of its depositors and other creditors, including liquidating and closing State if that is necessary.

16. Since September 30, 1983, State has violated, and continues to violate, Section 58-10-68 of the Savings and Loan Act by receiving additional funds on deposit in savings accounts and investment certificates other than interest credited to such existing accounts and certificates when its net worth was and is less than that required by Regulation 81-1 S&LB and Section 563.13 of the FSLIC Insurance Regulations.

17. State is required by Section 58-10-53 NMSA 1978 of the Savings and Loan Act to have insurance on its accounts. State has insured its accounts with the FSLIC which is the only institution which can provide the required insurance. In the event the Court appoints a receiver for State and orders the receiver to liquidate and close State, the FSLIC will be required to pay the insurance on State's accounts.

WHEREFORE, the Supervisor requests the Court:

A. to appoint the Supervisor as receiver for State;

B. to order him in that capacity to take charge of the affairs of State, conduct its business, and take whatever steps are appropriate to conserve its assets and protect the rights of its depositors and other creditors, including liquidating and closing State without seeking Court approval if the Supervisor determines in his discretion that such action is necessary;

C. to order him in that capacity to refuse to permit State to receive additional funds on savings accounts and investment certificates, other than interest on such accounts and certificates, unless and until State meets its net worth requirement under Regulation 81-1 S&LB and Section 563.13 of the FSLIC Insurance Regulations;

D. to order him in that capacity to allow withdrawals from matured savings accounts;

E. to order him in that capacity to petition the Court for further instructions and other relief as he may deem necessary;

F. to order him in that capacity to tender the receivership to the FSLIC in the event he determines it is necessary to liquidate and close State;

G. to grant such other and further relief as to the Court seems proper.

Respectfully submitted,

PAUL BARDACKE
*Attorney General*

/s/ NOELLE L'HOMMEDIEU SCHOEN
(By Ellen Souberman)
Noelle L'Hommedieu Schoen
*Assistant Attorney General*

/s/ ELLEN SOUBERMAN
Ellen Souberman
*Assistant Attorney General*

Attorneys for Plaintiff
Post Office Drawer 1508
Santa Fe, New Mexico
87504-1508
(505) 827-6027

## VERIFICATION

STATE OF NEW MEXICO
COUNTY OF SANTA FE } ss.

Snider Campbell Supervisor, Savings and Loan Bureau, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico being first duly sworn upon his oath, states that he is the Plaintiff in the above action; that he has read the foregoing Complaint for Appointment of a Receiver, understands the contents thereof and the allegations therein are true to the best of his information, knowledge and belief.

/s/ SNIDER CAMPBELL
SNIDER CAMPBELL,
*Supervisor Savings and Loan Bureau*

SUBSCRIBED AND SWORN to before me this 29 day of October, 1983.

[1]
*Notary Public*

My Commission Expires:

[2]

[1] Signature illegible

[2] Date illegible

STATE OF NEW MEXICO
COUNTY OF CURRY
IN THE DISTRICT COURT

SNIDER CAMPBELL, Savings
and Loan Supervisor,
Financial Institutions Division,
Regulation and Licensing
Department, State of New Mexico

*Plaintiff,*

vs. No. 83CV28979

STATE SAVINGS AND LOAN
ASSOCIATION, A New Mexico
Corporation,

*Defendant.*

## MOTION FOR TEMPORARY RESTRAINING ORDER AND IMMEDIATE APPOINTMENT OF TEMPORARY RECIEVER

COMES NOW the Plaintiff, SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico (Supervisor), through counsel, and moves this Court pursuant to Rule 66, N.M.R. Civ. P. to issue a temporary restraining order and appoint him temporary receiver in this case, and as grounds therefor states:

1. Simultaneous with the filing of this Motion for Temporary Restraining Order and Immediate Appointment of Temporary Receiver, Plaintiff has filed a verified Complaint for Appointment of a Receiver. The Supervisor hereby incorporates by reference the allegations contained in paragraphs 1 through 16 of said Complaint as if fully set forth herein.

2. It is the Supervisor's judgment that the current financial condition of State Savings and Loan (State) requires the immediate appointment of a receiver to protect the public interest from irreparable harm because State's assets in the aggregate do not have a fair value equal to its total liabilities to its creditors and to all holders of savings accounts and because a receiver is necessary to conserve State's assets and protect the rights of its depositors and other creditors.

3. The following circumstances now exist at State which severely jeopardize State's financial condition and thereby the rights of its depositors and other creditors:

a. State is required by the Savings and Loan Act, the duly promulgated regulations of the Supervisor, and the regulations of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation (FSLIC) to maintain a net worth of $448,305.00 during the period from January 1, 1983 through December 31, 1983.

b. As of September 30, 1983, State's reported net worth was $422,137.00; as of October 25, 1983, State's net worth on its own books had declined to $102,459.00 The said $102,459.00 amount includes in excess of $130,000.00[8] of capitalized expenses and specific loss reserves, which in accordance with accepted accounting principles should not be so included.

c. State incurred a net operating loss of $206,771.00 for the month of September, 1983. From September 30, 1983 to October 25, 1983, State incurred an additional operating loss of $319,678.00.

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[8] Original has the figure "$130,000.00" lined out and the figure $77,000.00 penned in above the line and initialed SC

d. State's assets in the aggregate do not have a fair value equal to State's total liabilities to its creditors and to all holders of State savings accounts as described in Paragraphs 11 and 12 of Plaintiff's Complaint for Appointment of a Receiver, filed simultaneously with this Motion and incorporated herein by reference as though fully set forth.

4. Further, it is the Supervisor's information and belief that State now has a liquidity of just over four (4) million dollars.

5. It is the Supervisor's information and belief that over the past several months, millions of dollars have come into State and have been quickly disbursed and that said practice will continue, further jeopardizing whatever liquidity presently exists, and causing irreparable harm to the association, its depositors and other creditors, unless (a) the directors, officers, stockholders, agents and employees of State are immediately restrained from conducting the business of State and disposing of or disbursing any assets of State; and (b) a temporary receiver is immediately appointed to take charge of the business affairs of State and conserve its assets.

WHEREFORE, the Supervisor requests the Court:

A. to enjoin State's directors, officers, stockholders, agents and employees from in any way conducting the business of State and from disposing of or disbursing any assets of State until further order of the Court, except at the direction of the receiver.

B. to appoint the Supervisor temporary receiver for State;

C. to order him in that capacity to take charge of the affairs of State, conduct its business, and take whatever steps are appropriate to conserve its assets and protect the rights of its depositors and other creditors, including at any

time after entry of the order requested herein liquidating and closing State without seeking Court approval if the Supervisor in his discretion determines such action is necessary;

D. to order him in that capacity to refuse to permit State to receive additional funds on savings accounts and investment certificates, other than interest on such accounts and certificates, unless and until State meets its net worth requirement under Regulation 81-1 S&LB and Section 563.13 of the FSLIC Insurance Regulations;

E. to order him in that capacity to allow withdrawals from matured savings accounts;

F. to order him in that capacity to petition the Court for further instructions and other relief as he may deem necessary;

G. to order him in that capacity to tender the receivership to the FSLIC in the event he determines it is necessary to liquidate and close State;

H. to consolidate the hearing on the Supervisor's request for a preliminary injunction and the trial on the merits in this matter.

I. to grant such other and further relief as to the Court seems proper.

Respectfully submitted,

PAUL BARDACKE
*Attorney General*

/s/ NOELLE L'HOMMEDIEU SCHOEN
(by Ellen Souberman)
NOELLE L'HOMMEDIEU SCHOEN
*Assistant Attorney General*

/s/ ELLEN SOUBERMAN
ELLEN SOUBERMAN
*Assistant Attorney General*

Attorneys for Plaintiff
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6027

## VERIFICATION

STATE OF NEW MEXICO
COUNTY OF SANTA FE } ss.

Snider Campbell, Supervisor, Savings and Loan Bureau, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico being first duly sworn upon his oath, states that he is the Plaintiff in the above action; that he has read the foregoing Motion for Temporary Restraining Order and Appointment of Receiver, understands the contents thereof and the allegations therein are true to the best of his information, knowledge and belief.

/s/ SNIDER CAMPBELL
SNIDER CAMPBELL, *Supervisor*
*Savings and Loan Bureau*

SUBSCRIBED AND SWORN to before me this __[1]__ day of October, 1983.

[2] _____
*Notary Public*

My Commission Expires:

[3] _____

[1] Date illegible

[2] Signature illegible

[3] Date illegible

STATE OF NEW MEXICO
COUNTY OF CURRY
IN THE DISTRICT COURT

SNIDER CAMPBELL, Savings and Loan Supervisor, Financial Institutions Division, Regulation and Licensing Department, State of New Mexico, [1]

*Plaintiff,*

vs. No. 85CU28979

STATE SAVINGS AND LOAN ASSOCIATION, a New Mexico Corporation,

*Defendant.*

## TEMPORARY RESTRAINING ORDER AND APPOINTMENT OF TEMPORARY RECEIVER

THIS MATTER having come before this Court upon Plaintiff's Complaint for Appointment of a Receiver and verified Motion for Temporary Restraining Order and Immediate Appointment of Receiver, Plaintiff being present and represented by counsel, Defendant being present and represented by counsel, the Court having heard the evidence and argument of counsel and being otherwise fully advised in the premises FINDS:

1. The Plaintiff is the duly qualified, appointed and acting supervisor of the Savings and Loan Bureau, Financial Insti-

[1] File Stamp is illegible.

tutions Division, Regulation and Licensing Department, State of New Mexico (Supervisor) and pursuant to the New Mexico Savings and Loan Act, Section 58-10-1 *et seq.*, NMSA 1978 (Savings and Loan Act) exercises general regulatory and supervisory authority over all state chartered savings and loan associations in New Mexico.

2. Defendant State Savings and Loan Association (State) is a New Mexico chartered savings and loan association with permanent capital stock established and chartered pursuant to the Savings and Loan Act. State is subject to the Savings and Loan Act and to the lawful regulations promulgated by the Supervisor pursuant to the Savings and Loan Act. (Regulation *S&LB*).

3. State is a member of the Federal Home Loan Bank system and is subject to the provisions of the Federal Home Loan Bank Act, 12 U.S.C. Sections 1421 *et seq.*, and the Federal Home Loan Bank Systems Regulations, 12 C.F.R. Sections 521.1 *et seq.*

4. State's accounts are insured by the Federal Savings and Loan Insurance Corporation (FSLIC) pursuant to Title IV of the National Housing Act, 12 U.S.C. Sections 1724 *et seq.*, and State is subject in all respects to that Title and to the Rules and Regulations for Insurance of Accounts, 12 C.F.R. Sections 561.1 *et seq.* (the FSLIC Insurance Regulations).

5. This Court has jurisdiction pursuant to the Savings and Loan Act, Section 58-10-85, and Section 53-16-16 of the New Mexico Business Corporations Act, Sections 53-16-1 *et seq.*, NMSA 1978, and Rule 66, N.M.R. Civ. P.

6. Venue for this action, as provided in Section 58-10-85 NMSA 1978 of the Savings and Loan Act, is proper in the

county where State's principal office is located. State's principal office is located in Clovis, Curry County, New Mexico.

7. The current financial condition of State appears to require the immediate appointment of a receiver to protect the public interest from irreparable harm because State's assets in the aggregate do not have a fair value equal to its total liabilities to its creditors and to all holders of savings accounts.

8. The appointment of a temporary receiver is necessary to conserve State's assets and protect the rights of its depositors and other creditors from irreparable harm.

9. The Supervisor is qualified to be appointed receiver of State and is bonded in his capacity as a State employee.

10. Notice given to counsel for State prior to this matter coming on for hearing was reasonable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. State's directors, officers, stockholders, agents and employees be, and hereby are enjoined from in any way conducting the business of State and from disposing of or disbursing any assets of State until further order of the Court, except at the direction of the receiver;

B. the Supervisor be, and hereby is appointed temporary receiver for State;

C. the Supervisor shall in that capacity take charge of the affairs of State, conduct its business, and take whatever steps are appropriate to conserve its assets and protect the rights of its depositors and other creditors including at any time after entry of this order liquidating and closing State

without seeking Court approval if the Supervisor in his discretion determine such action is necessary;[9]

D. the Supervisor shall in that capacity refuse to permit State to receive additional funds on savings accounts and investment certificates, other than interest on such accounts and certificates, unless and until State meets its net worth requirement under Regulation 81-1 S&LB and Section 563.13 of the FSLIC Insurance Regulations;

E. the Supervisor shall in that capacity allow withdrawals from matured savings accounts;

F. the Supervisor shall in that capacity petition the Court for further instructions and other relief as he may deem necessary;

G.[10] the Supervisor shall in that capacity tender the receivership to the FSLIC in the event he determines it is necessary to liquidate and close State;

H. the furnishing of any security by the Supervisor shall be waived.

[11]IT IS FURTHER ORDERED that a consolidated hearing on Plaintiff's request for a preliminary injunction and

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[9] Original in paragraph C. has the words "including at any time after entry of this Order liquidating and closing State without seeking Court approval if the Supervisor in his discretion determines such action is necessary" lined out and a period is penned in after the word creditors, and "REN District Judge" is written in the left margin by the Judge.

[10] Original has paragraph G. lined out with the initials "REN District Judge" penned in the right margin by the judge.

[11] Original has the words "IT IS FURTHER ORDERED that a consolidated hearing on Plaintiff's request for a preliminary injunction and trial on the merits in this matter shall be set for __ o'clock

trial on the merits in this matter shall be set for __ o'clock in the ____ noon on the __ day of ____, 1983 before the Honorable _____, District Court Judge, at the Curry County Courthouse, Clovis, New Mexico.

Entered this 2nd day of November, 1983 at 2:00 o'clock P.M. in the _____noon.[12]

/s/ REUBEN E. NIEVES

DISTRICT JUDGE

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in the ____ noon on the __ day of ____, 1983 before the Honorable _____, District Court Judge, at the Curry County Courthouse, Clovis, New Mexico." lined out and the initials "REN District Judge" are penned in the left margin by the judge.

[12] Original has the initials "P.M." has been penned in after the word "O'clock" and the words "in the __noon" lined out. No initials appear in either margin.